Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, PETER POE and COE PRESS, INC.,

Petitioners,

—v.—

JANE DOE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In the

Supreme Court of the United States

October Term, 1973

No. .....

Joan Roe, Peter Poe and Coe Press, Inc.,

Petitioners,

—v.—

Jane Doe,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Joan Roe, Peter Poe, and Coe Press, Inc., petitioners herein, hereby respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

Opinions Below

The opinions of the courts below are unreported. The Court of Appeals of the State of New York decided this case without opinion; its amended decision, showing the presentation of a federal question, is set forth in Appendix A, *infra*, at p. 1a; the original decision of that court is set forth at p. 1a. The opinion of the Supreme Court, Appellate Division, First Department, is set forth in Appendix B, *infra*, at pp. 2a-3a. The opinion of the Su-

preme Court, Special Term, New York County, is set forth in Appendix C, *infra*, at pp. 4a-6a.

Jurisdiction

The decision of the Court of Appeals of the State of New York, of which review is here sought, was entered on December 28, 1973; that court's amended decision, revised to show the presentation and consideration of a question under the Constitution of the United States, was entered on February 25, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

Whether the courts below erred in holding that it was not an invalid prior restraint upon freedom of the press, in violation of the First Amendment to the United States Constitution, to grant a preliminary injunction, completely prohibiting the distribution and sale of a concededly truthful, nonobscene book concerning matters of scientific and medical interest and importance.

Constitutional Provision Involved

United States Constitution, Amendment One:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Statement of the Case

This petition seeks review of the extraordinary—indeed, absolutely unprecedented—actions of the courts of the State of New York, which for nearly a full year have enjoined the distribution and sale of a concededly truthful and nonobscene book, concerning matters of great scientific and medical interest and importance.[1] The courts below, it is respectfully submitted, have acted in total disregard of the requirements of the First Amendment, and of this Court's decisions, and have grievously abridged the liberties not only of the petitioners, the authors and publisher of the book, but of countless members of the reading public, lay and professional alike, who are being denied the right to choose what they wish to read.

The facts in this case, insofar as facts have been found at all by the courts below, are set out most fully in the opinion of Supreme Court, Special Term (App. C, *infra*, pp. 4a-6a). The petitioners Roe and Poe (a wife and husband who are, respectively, a psychiatrist and a lay psychotherapist), wrote the book which is here in issue, and it was published by the petitioner Coe Press, Inc. The book, published in February, 1973, is largely a case history of the psychiatric treatment of the respondent, Jane Doe, who was from 1956 to 1963 a psychotherapeutic patient of the petitioner Roe, and of the respondent's late former husband, who during portions of the same period was also a patient of Dr. Roe; the treatment ended over ten years ago.

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[1] Although the injunction is styled as "preliminary" by the courts below, there can be little doubt that it is a final decision, reviewable by this Court under 28 U.S.C. §1257(3), as this Court has construed the latter provision. See pp. 13-16, *infra*.

As the opinion of Special Term reveals, there are seriously disputed questions of fact as to whether the respondent's identity can be determined by a reader of the book, and whether respondent gave permission for publication of the book. Insofar as these factual disputes were resolved at all, they were resolved largely in petitioners' favor.[2]

Nevertheless, after the briefest of hearings, proceeding solely upon affidavits and upon oral argument by counsel, Special Term issued a partial injunction against further circulation of the book, limiting its distribution solely to "scientific and medical" channels, and barring it from "trade press" distribution to the general public. The *nisi prius* court did so although it was totally unable to offer citation of a single precedent, from this Court or any other, in justification of its indeed unprecedented action. Petitioners forthwith appealed to the Appellate Division, First Department; that Court, on the basis of an even obscurer opinion, affirmed the issuance of the injunction, but broadened it so as to prohibit any distribution of the book whatsoever, whether through medical and scientific channels or otherwise. Petitioners again appealed, by permission of the Appellate Division, to the Court of Appeals of the State of New York; once again, the Court affirmed, without discussion of the merits in any way whatsoever.

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[2] Special Term found:

"... defendants have taken some steps to disguise the identity of the patients. I think these steps reasonably met the usual standards for such disguising of patients' identities" (5a), and "... the examples of possible identification given by plaintiff in the moving affidavit must be assumed to be the more striking ones; I do not think they would really identify plaintiff as the patient to someone who did not already know that plaintiff was the patient" (5a).

Although petitioners have sought at every stage to expedite the proceedings in the State courts, in the hope that the requirements of the First Amendment would be recognized and the injunction lifted,[3] distribution of the book has now been enjoined for nearly a full year, since the entry of the order of Special Term on May 7, 1973. If this Court does not review and vacate the actions of the courts below, the injunction will remain in effect throughout the pendency of the trial and appeals of this action, which could well consume a period of years. This Court should not countenance such an egregious abridgment of the precious rights which are guaranteed by the First Amendment.

REASONS FOR GRANTING THE WRIT

Certoriari should be granted because the state court decision below, on an important question of substance of Federal constitutional law, is not in accord with applicable decisions of this Court.

1. It is respectfully submitted that the writ should be granted in this case, because the actions of the courts below stand in direct contravention of over four decades of clear and unequivocal decisions by this Court, that prior restraints upon freedom of the press are presumptively unconstitutional, and that the precious and highly preferred rights which are protected by the First Amendment can be overcome only by carrying the heaviest burden of

[3] The appeal to the Appellate Division was heard on an expedited basis at a special June, 1973 Term of that Court, rather than being held over through the summer recess; on the appeal to the Court of Appeals, a preference was granted upon motion of the petitioners.

justification. There can be no disagreement with the Chief Justice's observation that "... every member of the Court, tacitly or explicitly, [has] accepted the Near and Keefe condemnation of prior restraint as presumptively unconstitutional." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, —— U.S. ——, 37 L. Ed.2d 669, 683 (1973) (Dissenting Opinion). Yet, every day in which the injunction is permitted to stand, is another day in which there continues a presumptively unconstitutional prior restraint on publication.

The central error in the decisions of the State courts, it is respectfully submitted, is expressed in the assumption by Special Term that "... the only justification for permitting defendants to publish information obtained in confidence from their patients is the claimed scientific value of the disclosure ..." (5a). Such an assumption, of course, is diametrically opposed to the correct analysis of the propriety of imposing a presumptively unconstitutional prior restraint upon freedom to publish; the entire purpose of the free press provision of the First Amendment was to establish, in the organic law of the nation, an overwhelming presumption in *favor* of freedom to publish, and it is not open to the courts of any state to place the burden of justification on the writer or the publisher.[4]

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[4] "As a starting point, one must assume the general principle that under the First Amendment and our notions of a democratic society, freedom of expression is the rule and constraint the exception. ... [T]he ... principle, that only in the most urgent circumstances can a limitation upon freedom of expression be justified, and that the courts, under the First Amendment, have a serious obligation to strike down limitations which do not clearly meet such conditions, is fundamental to any analysis of prior restraint." Emerson, 'The Doctrine of Prior Restraint," 20 LAW & CONTEMP. PROB. 648, 655 (1955). See also Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 503-512 (1970).

Over forty years ago, in *Near* v. *Minnesota,* 283 U.S. 697 (1931), this Court established the principles which must govern in any case of prior restraint; the milestone opinion of Mr. Chief Justice Hughes, writing for the Court, is directly applicable to the present case:

> "In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in the renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.' 4 Bl. Com. 151, 152; see Story on the Constitution, §§ 1884, 1889." 283 U.S. at 713-714 (Emphasis in original; footnote omitted).[5]

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[5] Mr. Justice Harlan has explained that the rationale for this special constitutional animadversion to prior restraints is the "social necessity" of freedom of the press in our system. "It is because of the personal nature of this right that we have rejected all manner of prior restraint on publication, *Near* v. *Minnesota* [citation], despite strong arguments that if the material was unprotected the time of suppression was immaterial." *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 149-150 (1967).

Since *Near*, this Court, notwithstanding its changing composition, has been absolutely consistent, to the present day, in holding that "any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times* v. *United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Freedman* v. *Maryland*, 380 U.S. 51, 57 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963). In every one of the latter cases, although the systems for the prior restraint of free expression sought to be imposed varied radically, each was held to be invalid. Thus, this Court has refused to permit the use of judicial injunctions against the publication of news, in the face of a government claim of grave peril to the national security (*New York Times*); or against residential picketing and leafleting, in the face of a privacy claim (*Organization for a Better Austin*); or against rallies preaching race hatred, in the face of a claim of imminent danger of riot (*Carroll*); it has likewise struck down systems of movie censorship (*Freedman*), and a system of state-supported "informal" discouragement of the circulation of books (*Bantam Books*).

The sole case known to petitioners in which this Court has ever approved a form of prior restraint of circulation of the printed word is *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957), which is so distinguishable from the present case as to be almost totally irrelevant. The plainest distinction, of course, is that *Kingsley* involved material that was unquestionably obscene, and therefore beyond the protection of the First Amendment; no question of ob-

scenity has been raised in the present case.[6] As Mr. Justice Brennan observed, concurring in *New York Times* v. *United States, supra,* 403 U.S. at 726, n. 1:

> "... [C]ases regarding temporary restraints of allegedly obscene materials, are not in point, for these cases rest upon the proposition that 'obscenity is not protected by the freedoms of speech and press.' Roth v. United States, 354 U.S. 476 (1957)."

See also *Near* itself, which made clear that it was not intended to bring obscenity within the protection against prior restraints. 283 U.S. at 716.

Notwithstanding the clear and unequivocal nature of this unbroken chain of decisions by this Court, all were simply ignored by the courts of the State of New York. Thus, Special Term, in its opinion, without benefit of citation of a single case or other authority, astonishingly overrode all of the clear contrary precedent with the simple observation, "In its usual breadth, I do not accept the applicability of this doctrine to the present case" (4a); the Appellate Division was no more enlightening, observing only that "... we agree with Special Term that the granting of a preliminary injunction, under the circumstances here disclosed, would not constitute an invalid prior restraint upon publication" (2a); the Court of Appeals, without opinion, affirmed these incredible holdings.

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[6] At oral argument in the New York Court of Appeals, respondent's counsel in effect conceded that the book could not be attacked as obscene, but asserted that it was nonetheless not entitled to First Amendment protection because the therapeutic doctrine which it implicitly espoused, the treatment of schizophrenia without drugs and without shock, was, in respondent's counsel's view, not scientific, but "quackery." The absence of an opinion from the Court of Appeals makes it impossible to determine if this book-banning argument had any influence on the Court below.

Even if it could be argued that after a full trial of the merits in this case, and a judgment in respondent's favor, an injunction against further publication would be justifiable,[7] no such trial has been held here, and the issuance and continued existence of the injunction is still more outrageous. While it is not the province of this Court to engage in fact finding as to whether respondent may be identified in the book, or whether respondent gave permission for publication, and while it is a question of state law as to whether oral consent is sufficient, this Court has acknowledged a duty to engage in sufficient "constitutional fact finding", cf. *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81, at 82 (1967); *New York Times* v. *Sullivan,* 376 U.S. 254, at 284-285 (1964), to ascertain the existence of hotly contested questions concerning factual issues—questions which, insofar as they have been resolved at all by the courts below, on the basis of affidavits and statements of counsel, have been largely resolved in favor of petitioners. See n. 2, *supra.*

To base the issuance of a preliminary injunction on such flimsy factual grounds, is still more outrageous than were the injunctions in *New York Times* v. *United States; Carroll; Freedman; Bantam Books; Kingsley;* and *Near,* all *supra,* all of which at least were based upon findings after full trial and determination of the factual issues involved. See *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* —— U.S. ——, 37 L. Ed.2d 669, at 679-680 (1973). While the scheme of regulation of advertising there involved was found to be constitutional,

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[7] Petitioners do not concede that an injunction would be proper even after a final judgment against them; precisely such an injunction was at issue, and found improper, in *Near* v. *Minnesota, supra.*

this Court carefully noted that a full trial of the issues would be necessary before any sanctions could be imposed.

> "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment. . . . [B]ecause no interim relief was granted, the order will not have gone into effect until it was *finally determined* that the actions of Pittsburgh Press were unprotected." (Emphasis supplied; fn. omitted.)[8]

In the present case, by contrast, the respondent has succeeded in having the state courts enjoin all circulation of a book under a circumstance where it is, at the most generous, doubtful in the extreme that respondent has pleaded a cause of action at all.[9] In order to reach a decision with a degree of certainty similar to that in *Kingsley* or in *Pittsburgh Press,* it would have been necessary for the courts below to decide, on this preliminary motion, the merits of the entire case; this they plainly have not done, nor could they properly have done so.

Petitioners are certainly aware of the clash of interests which lurk beneath the surface of this case, and which are still to be vigorously litigated in this case of first im-

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[8] Even with this reassurance in Mr. Justice Powell's opinion for the Court, the Chief Justice nevertheless dissented on the ground that "the weighty presumption of unconstitutionality of prior restraint" was not sufficiently respected. *Id.* at 683, n.3.

[9] Both of the opinions below implicitly recognize that there is no common law cause of action in New York for breach of doctor-patient confidential relationship, Special Term by reaching for a trade secret analogy (without citation), and the Appellate Division by vague references to an emerging constitutional right of privacy. No decisions applying New York law were even mentioned.

pression. There is, of course, a substantial privacy interest, which must be balanced against general First Amendment interests, see *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952); *Lamont* v. *Commissioner of Motor Vehicles*, 267 F. Supp. 880, 884 (S.D.N.Y. 1967), aff'd, 386 F.2d 449 (2d Cir. 1967), *cert. den.*, 391 U.S. 915 (1968); Haiman, "Speech Against Privacy," 67 N.W.U. L. Rev. 153 (1972); as well as the specific interest in not frustrating scientific publication of case histories in accordance with professional standards of disguised identity. See American Medical Association, Opinions and Reports of the Judicial Council, vii, 59 (1971); see also the thoughtful study by Ruebhausen and Brim, "Privacy and Behavioral Research," 65 Col. L. Rev. 1185, 1211 (1965), which discusses the problems involved in striving for an accommodation of "the productive tension between the needs and advancement of science and the vibrant diversity of human personality." Obviously, this certiorari petition is not the occasion for that debate, since there are unsettled questions of state law involved, as well as intermingled Federal questions. But the absolutely first and threshold question, which can only be settled by this Court's grant of certiorari, is whether a non-obscene book on a serious scientific subject can be totally banned in New York, even before these novel and perhaps difficult questions have been litigated. Petitioners respectfully urge that this Court grant certiorari, and vacate the intolerable prior restraint which has been established and perpetuated by the New York state courts.

Despite the paucity—indeed the absence—of constitutional analysis by the courts below, it must be assumed that all of the New York courts which ruled on this case must

have regarded this case as somehow not being subject to the prior restraint doctrine. If an exception can be so easily found, the integrity of this Court's rule of law is undermined. This Court should, in any event, grant certiorari to clarify whether the prior restraint prohibition will or will not allow the broad exception which has now been established in the state which contains the largest book publishing center in the country.

2. Although the injunction which has been issued against petitioners has been characterized as a "preliminary" injunction, there can be little doubt that the decision of the Court of Appeals is a "final" decision within the meaning of 28 U.S.C. §1257(3), and may be reviewed by this Court. Despite the literal language of §1257, this Court has repeatedly held that it may review nominally interlocutory decisions of state and lower federal courts, where such decisions will necessarily cause serious and continuing harm to important national policies, and where such decisions, although nominally interlocutory, in fact represent the lower court's final word on an important issue which is separable from the other issues in the case, and which might not otherwise be reachable for review by this Court. Cf. *Rosenblatt* v. *American Cyanamid Co.*, 86 S. Ct. 1, 15 L. Ed.2d 39, 42 (1965) (Opinion in chambers per Goldberg, J.).

Thus, in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), the injunction against picketing which was under review was termed "temporary" by the Illinois courts. Nevertheless, the Chief Justice observed, for eight members of the Court, "the temporary injunction here, which has been in effect for over three years, has already had marked impact on petitioners' First Amendment rights," and this was a major consideration influencing the

Court in the granting of certiorari. 402 U.S. 415, at 419, n. 1. Similarly, in the present case, the "preliminary" injunction has now been in effect for nearly one year, and will continue to be in effect at least until the trial of the case, if not also through the exhaustion of the state appellate process, a matter, possibly, of several more years. Likewise, in *Local No. 438, Construction & General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542 (1963), which reviewed a nominally non-final decision by the Supreme Court of Georgia, granting a temporary injunction against labor picketing, this Court's grant of certiorari was plainly influenced in large part by the need to protect and vindicate the important national policy that such disputes are solely within the jurisdiction of the National Labor Relations Board. If such importance is to be attached by this Court to a statutory policy, albeit an important one, then surely no less respect must be accorded to a fundamental national policy, embodied in the Constitution itself, and vindicated repeatedly in decisions of this Court.[10]

The finality of a lower court's decision on a particular issue, separable from the remaining issues in the case, and otherwise difficult or impossible for this Court to review, has also frequently caused this Court to review a nominally interlocutory decision. See, e.g., *Mercantile National*

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[10] Similarly in other areas where this Court, or the federal courts generally, might ordinarily refrain from exercising their discretionary jurisdiction, state action which has a chilling effect upon the exercise of First Amendment rights will nevertheless be the subject of federal judicial intervention. See *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Steffel* v. *Thompson*, —— U.S. ——, 42 U.S.L.W. 4357 (March 18, 1974). If a mere "chilling effect" is to have such a result, no less will suffice in the present case, where the petitioners' First Amendment rights have in effect been frozen solid for a year.

Bank v. *Langdeau*, 371 U.S. 555 (1963); *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949); cf. *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, at 389, n. 4 (1964). Particularly relevant is *Cohen*, in which the issue was whether a plaintiff in a stockholder's derivative action could be subjected to a state requirement for the posting of a bond for costs; although the main action had not yet been decided, this Court granted review on the latter issue alone. Mr. Justice Harlan discussed at some length the reasons for this grant in his dissenting opinion in *Langdeau*, *supra*, 371 U.S. 555, at 574:

> ". . . the challenged order would not have been merged in the final judgment and . . . unless immediate review had been granted, no appellate determination of the right claimed could ever have been obtained."

In the present case, likewise, the action of the New York state courts in granting a "preliminary" injunction cannot be reviewed by this Court, unless this petition is granted. Should a final judgment for respondent be entered after trial of the case, that judgment will be the sole subject of any possible review by this Court; should petitioners prevail, of course, the issuance of the injunction, although proven all the more outrageous, will have become moot and unreviewable by this Court.

Should this Court permit the nominally interlocutory nature of injunctions such as the present one to prevent the granting of certiorari, the state courts will forever be free to grant at will injunctions *pendente lite*, without regard to their serious and lasting abridgment of First Amendment liberties. It is respectfully submitted that this Court should be governed by considerations similar to those

which are often applied in reviewing cases which are argued to be technically moot, but which, in fact, are "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, at 515 (1911); cf. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, at 632 (1953). Even at risk of transgressing the limits of the "case or controversy" clause, review will be granted where the rights sought to be vindicated are of sufficient importance. Surely, few rights of greater importance can be imagined than those asserted by petitioners, and this Court should grant the writ which they seek.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York,
March 26, 1974.

Respectfully submitted,

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APPENDICES

APPENDIX A

Decision Court of Appeals
February 25, 1974

Motion to amend the remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Defendants-appellants argued that the order of the Appellate Division enjoining, during the pendency of the action, all distribution of the book in issue constituted an impermissible prior restraint upon freedom of the press in violation of the First Amendment to the Constitution of the United States. The Court of Appeals considered this contention and held that the preliminary injunction did not constitute such violation.

Decision Court of Appeals
December 28, 1973

Order affirmed, with costs. Question certified answered in the affirmative. No opinion. All concur.

APPENDIX B

Decision of Appellate Division, First Department, Supreme Court, State of New York

Resettled order of Supreme Court, New York County (Silverman, J.), entered May 17, 1973, granting, to a limited extent only, plaintiff's motion for a preliminary injunction, unanimously modified, on the law and in the exercise of discretion, to the extent of enjoining, during the pendency of this action, all distribution of the book in issue, upon condition that plaintiff increases her undertaking to $5,000. Except as so modified, said order is affirmed, with $40 costs and disbursements to plaintiff.

The underlying issue in this action involves the right of a former patient to restrain her analyst's disclosure, through the means of a commercial book, of certain confidential communications. It is undisputed that the publication sought to be enjoined relates to the case history of plaintiff and her family. Plaintiff claims the near-verbatim record of her psychotherapeutic treatment constitutes a breach of confidence and an invasion of her right of privacy. Defendants contend, inter alia, that the limited injunction granted below is an invalid prior restraint (*Near* v. *Minnesota*, 283 U.S. 697). Special Term refused to apply the doctrine of prior restraint to the instant case but, because of the claimed scientific value of the disclosure, enjoined only such distributions as were not reasonably calculated to reach the scientific reader. While we agree with Special Term that the granting of a preliminary injunction, under the circumstances here disclosed, would not constitute an invalid prior restraint upon publication, we find no justification for the distinction attempted to be

drawn between "scientific readers", and the general public. Pending the outcome of this litigation plaintiff is entitled to either full protection or to no protection at all. We are of the view that, upon the record before us, she is entitled to full effective interim relief. Not every prior restraint is prohibited (*cf. Kingsley Books* v. *Brown*, 354 U.S. 436). The claimed justification for publication, resting on the alleged consent of plaintiff and the attempt to disguise her identity, does not provide a sufficient valid basis for denying the application.

Defendants also assert that no cause of action for a breach of confidentiality exists on the facts pleaded and that plaintiff cannot obtain relief under Civil Rights Law §§ 50 and 51, since those sections are inapplicable to a truthful, educative, nonfiction book on the subject of mental illness. Defendants' manner of advertising and selling the book, however, would seemingly contradict their avowed purpose of solely advancing scientific knowledge. In light of the expanding recognition of invasion of privacy actions (*cf. Griswold* v. *Connecticut*, 381 U.S. 479; *Roe* v. *Wade*, —— U.S. —— [41 U.S.L.W. 4213]; *Nader* v. *General Motors Corp.*, 25 N Y 2d 560), and in view of the confidentiality accorded the physician-patient relationship, we believe that plaintiff has alleged a cognizable claim for relief and has made a sufficient showing to warrant the granting of the provisional remedy requested.

Settle order on notice which shall provide, inter alia, for the granting of a preference for an early trial upon application of either party.

APPENDIX C

Decision of Special Term, New York County, Supreme Court, State of New York

SILVERMAN, J.:

Motion for a temporary injunction to restrain the publication and distribution of a book.

The authors are husband and wife, two psychoanalysts, the wife an M.D. and the husband a lay analyst. The book consists in very large part of a somewhat edited form of the notes of the psychoanalytic sessions (and conversations) of two patients, a husband and wife, together with a so-called diary of their child. Concededly, plaintiff and her deceased husband were the patients; they were both patients of the female defendant psychoanalyst.

In the book the patients' first names only are given, and the first names so given are not those of plaintiff, her husband or their child. Defendants claim to have made certain changes to disguise the identity of the patients without impairing the scientific validity of the book.

Defendants argue that the injunction cannot issue because of the well-established rule against prior restraints on publication. In its usual breadth, I do not accept the applicability of this doctrine to the present case. When confidential information is learned, in confidence, under a contract that it shall not be disclosed, I think an injunction will lie to restrain the unauthorized disclosure. The most obvious case that comes to mind is injunctions against disclosure of trade secrets by an employee who has learned those secrets in the course of his employment.

Here the defendants obtained information from plaintiff, under the implied, if not express, agreement that confidence would be respected, and indeed with the express

understanding that disclosure to defendant was necessary in order for defendant to perform for plaintiff the professional services for which defendant had been retained.

However, there is a countervailing consideration. It is a well-established practice in the medical profession for physicians to publish reports of interesting cases for purposes of scientific advancement or education, taking care of course not to disclose the name or identity of the patient. There is an obvious public interest in having physicians do this. And Freud published accounts of the analysis of some of his patients in this way. (e.g., *History of an Infantile Neurosis; Analysis of a Phobia in a Five Year Old Boy* [Freud, Collected Papers, Vol. 3]).

Defendants claim that the book is of scientific value; I do not think it is for judges to rule that it is not. And defendants have taken some steps to disguise the identity of the patients. I think those steps reasonably meet the usual standards for such disguising of the patients' identities. While I have not read this 1,000 page book, the examples of possible identification given by plaintiff in the moving affidavit must be assumed to be the more striking ones; I do not think they would really identify plaintiff as the patient to someone who did not already know that plaintiff was the patient.

Accordingly plaintiff is not entitled to an injunction restraining all further publication and distribution of this book. In that connection I note that about 200 copies of the book have already been sold.

As the only justification for permitting defendants to publish information obtained in confidence from their patients is the claimed scientific value of the disclosure, defendants should not attempt to distribute the book for other purposes. Advertisements of the book in the New York Times and the New Republic referring to it as "A symphony

of feeling—read it for the sheer pleasure of an intense experience" are hardly consistent with limitation to scientific purpose of publication. In the interest of limiting the book to the scientific distribution which alone justifies its distribution—and the concomitant pain to the patient—defendants will be enjoined from distributing the book in channels not reasonably calculated to be addressed to scientific readers; i.e., defendants may distribute the book through universities, medical schools and other institutions of learning, including psychiatry, psychology, social work and related fields, and book stores associated with them; stores which carry medical, psychiatry, psychology or other scientific works; text-book stores, etc.; but not ordinary trade book channels of publication not related to the distribution of scientific works.

I pay no attention to the alleged (and disputed) implied-in-fact consent of plaintiff to publication ten years ago. A doctor who wishes to publish confidential material about his patient and relies on the patient's consent should take care to get that consent in clear, unambiguous written form.

The motion for a temporary injunction is granted to the limited extent only stated above; otherwise denied. Bond fixed at $2500.

In accordance with the stipulation of the parties, the papers in this case will be sealed, and I have signed the stipulated order to that effect.

Settle order.

This decision shall not be submitted for publication in the Law Journal.

Dated: April 24, 1973.

S. J. S.
J.S.C.